Public Bank Bhd v Noor Ehsannuddin bin Mohd Harun

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24–771 OF 1998
JEFFREY TAN J
29 NOVEMBER 2000

Land law *— Charge — Order for sale — Whether there exist cause to the contrary — National Land Code 1965 s 256(3), Form 16D*

Land law *— Charge — Notice of demand — Application for Form 16D include a demand for a sum not secured by the charge — Whether notice in Form 16D defective*

The plaintiff/chargee granted to the defendant two distinct facilities: (i) a fixed loan of RM125,000 ('the fixed loan') and an overdraft of RM45,000 ('the first overdraft') secured by two land charges; and (ii) an overdraft of RM650,000 ('the second overdraft') secured by the deposit of shares. When the defendant defaulted in repayments, the plaintiff demanded for payment of the arrears. When the defendant failed to comply with the plaintiff's demand, the plaintiff issued a notice in Form 16D of the National Land Code 1965 ('the NLC') claiming for the amount owing under the fixed loan, the first overdraft and the second overdraft. The plaintiff applied under s 256 of the NLC for an order for sale of the land charged. The issue for determination was whether there was a cause to the contrary to the application for order for sale in that the notice in Form 16D required the defendant to remedy not only the breach with respect to the charge, but also with respect to the breach of the second overdraft secured by the deposit of shares.

Held, dismissing the application:

(1) Form 16D of the NLC concerns only the case of a charge where thereis a breach by the chargor of any agreement on his part expressed or implied therein. Only a registered chargee may serve a notice in Form 16D. And that notice in Form 16D must bear only upon the registered charge. That notice in Form 16D, available only to a chargee to give notice to a chargor to remedy the specified breach of the charge in question, before action for sale is taken, cannot be taken out for any other purpose (see pp 253G, I–254A); *Jacob v Oversea-Chinese Banking Corp, Ipoh* [1974] 2 MLJ 161 followed. Only if the breach of the charge has not been remedied at the expiry of the period specified, is the chargee sanctioned to apply for an order for sale (see p 254B) .

(2) The legal effect of the inclusion of the second overdraft unsecured by a charge in the said notice in Form 16D and whether the said notice was bad in law would depend on whether the chargor had been prejudiced or misled by any defect in the notice so as to render the granting of the order for sale unjust, and this in turn must necessarily depend on the circumstances of each particular case. Foist with the additional burden of the second overdraft that was much heavier than the burden of the fixed loan secured by the

first charge, it could be hard to believe that the defendant would not have been prejudiced by the defect in the said notice. The defendant had demonstrated that the plaintiff had not complied with statutory requirements nor met the conditions precedent for the making of an application for an order for sale. The defendant was not given any opportunity to remedey the breach only with respect to the charge. Rather, the plaintiff denied the defendant his statutory right, by a brazen disregard for the law. In the circumstances of this case, an order for sale would be unjust. Surely, there was cause to the contrary (see pp 254G, 255G–H).

[Bahasa Malaysia summary

Plaintif/chargee telah memberikan defendan dua kemudahan yang berbeza: (i) pinjaman tetap sebanyak RM125,000 ('pinjaman tetap tersebut') dan satu overdraf berjumlah RM45,000 ('overdraf pertama') yang diperolehi menerusi dua cagaran tanah; dan (ii) suatu overdraf sebanyak RM650,000 ('overdraf kedua') yang diperolehi menerusi deposit saham-saham. Apabila defendan ingkar dalam bayaran balik, plaintif menuntut bayaran tunggakan. Apabila defendan gagal mematuhi tuntutan plaintif, plaintif mengeluarkan satu notis dalam Borang 16D Kanun Tanah Negara 1965 ('KTN') yang menuntut jumlah harus dibayar di bawah pinjaman tetap tersebut, overdraf pertama dan overdraf kedua. Plaintif memohon di bawah s 256 KTN untuk satu perintah jual ke atas tanah yang dicagarkan. Isu untuk diputuskan adalah sama ada wujudnya sebab yang berlainan bercanggahan dengan permohonan untuk perintah jual dalam erti kata notis dalam Borang 16D menghendaki defendan untuk membaiki bukan sahaja kemungkiran berhubung dengan cagaran tersebut, tetapi juga berkenaan dengan kemungkiran overdraf kedua yang diperolehi menerusi deposit saham-saham.

Diputuskan, menolak permohonan tersebut:

(1) Borang 16D KTN cuma berkaitan dengan kes cagaran di mana telah berlakunya kemungkiran mana-mana perjanjian pada pihak penggadai secara nyata atau terseirat dalamnya. Hanya pihak kepada mana tanah digadaikan yang berdaftar boleh menyampaikan notis dalam Borang 16D. Dan notis itu dalam Borang 16D mestilah kena-mengena cagaran berdaftar. Notis itu dalam Borang 16D, yang hanya sedia ada kepada pihak kepada mana tanah digadaikan untuk memberi notis kepada penggadai untuk membaiki kemungkiran cagaran yang berkenaan, sebelum tindakan untuk menjual diambil, tidak boleh diambil untuk apa-apa tujuan lain (lihat ms 253G, I–254A); *Jacob v Oversea-Chinese Banking Corp, Ipoh* [1974] 2 MLJ 161 diikut. Hanya jikalau kemungkiran cagaran tersebut tidak dibaiki bila luputnya jangkamasa yang ditetapkan barulah pihak kepada mana tanah digadaikan dibenarkan membuat permohonan untuk perintah jual (lihat ms 254G, 255G–H).

(2) Kesan undang-undang atas kemasukan overdraf kedua yang tidak dicagar dengan satu cagaran dalam notis tersebut dalam Borang 16D dan sama ada notis tersebut kurang sempurna di sisi undang-undang akan bergantung kepada sama ada pencagar telah dimudaratkan atau diperdayai oleh apa-apa kecacatan dalam notis tersebut hingga menyebabkan pemberian perintah jual tersebut tidak saksama, dan berikutannya ini semestinya bergantung kepada keadaan setiap kes tertentu. Dikenakan dengan beban tambahan overdraf kedua yang jauh lebih berat daripada beban pinjaman tetap tersebut yang diperolehi oleh cagaran pertama, mungkin adalah sukar untuk mempercayai bahawa defendan tidak dimudaratkan oleh kecacatan dalam notis tersebut. Defendan telah menunjukkan bahawa plaintif tidak mematuhi keperluan berkanun ataupun memenuhi syarat terdahulu untuk membuat permohonan untuk satu perintah jual. Defendan tidak diberikan sebarang peluang untuk membaiki kemungkiran berkenaan dengan cagaran tersebut sahaja. Sebaliknya, plaintif menafikan defendan hak berkanun beliau, menerusi pengabaian untuk undang-undang. Dalam keadaan kes ini, satu perintah jual adalah tidak saksama. Tentu sekali adanya sebab yang berlainan (lihat ms 254G, 255G–H).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712.

For cases on notice of demand for order for sale, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1645–1659.

Cases referred to

Arab-Malaysian Merchant Bank Bhd v City Properties Sdn Bhd [1992] 4 CLJ 2123 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)

Jacob v Oversea-Chinese Banking Corp, Ipoh [1974] 2 MLJ 161 (folld)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (refd)

Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (refd)

Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 3 MLJ 493 (refd)

Oriental Bank Bhd v Mohinder Pal Kaur a/p Tirlok Singh [1996] 1 MLJ 788 (refd)

Overseas Union Bank Ltd v Lee Guat Cheow & Co Sdn Bhd [1987] 1 MLJ 51 (refd)
Overseas Union Bank (M) Bhd v L & L Properties Sdn Bhd [1999] 2 MLJ 637 (refd)
Southern Bank Bhd v Chuah Beng Hock [1999] 2 AMR 1826 (refd)
United Malayan Banking Corp Bhd v Bahruddin bin Mohammad @ Mamad [1992] 4 CLJ 2060 (refd)
Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115 (refd)

Legislation referred to

National Land Code 1965 ss 253, 254, 256, (2), (3), 340, Form 16D

Ana Shahrana bte Annuar (*C Sukumaran & Co*) for the the plaintiff.
Cherian Kuruvila (*Feroz & Co*) for the defendant.

Jeffrey Tan J. : This is the plaintiff/chargee's application (encl 2 date 22 December 1998), under s 256 of the National Land Code 1965 ('the NLC'), for an order for the sale of the defendant's land held under HS (D) 6577 PTD 4050, Mukim Kluang, Daerah Kluang, Negeri Johore ('the said land').

On the matter of an application for an order for sale by the chargee made in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure, and it has to be said that a chargee so applying is only exercising his right as chargee (*Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257; *Arab-Malaysian Merchant Bank Bhd v City Properties Sdn Bhd* [1992] 4 CLJ 2123; *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119), it is settled, that the court shall order the sale of the land or lease to which the charge relates, 'unless it is satisfied of the existence of cause to the contrary' (see s 256(2) and s 256(3) of the National Land Code 1965). 'Section 256(3) of the National Land Code is mandatory.' The court shall order a sale unless it is satisfied of the existence of 'cause to the contrary' (*Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457).

The court is required, by the expression 'cause to the contrary', to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the charger's default is proved (*Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384). Even 'granted that these words have been construed … as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they [do not] extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly' (*Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors*).

The role of the judge, when dealing with applications under s 256 of the NLC, so as the Federal Court per Gopal Sri Ram explained, in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at pp 88–89, is as follows:

A judge hearing an application … is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.

On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction …

Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s 256 is opposed by the chargor on the ground that the chargee has acted in breach of the contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s 256 to properly appreciate their true role assigned to them by Parliament.

At p 89, the Federal Court further explained:

…, an order for sale made pursuant to s 256 of the Code is not a judgment. That was settled by the decision of the Supreme Court in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p 258):

> 'Here, there was no judgment debt. The claim of the appellant in the court below was if exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.'

In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court affirmed this principle and held that the making of an order for sale upon the failure of a chargor … did not bar a subsequent action in personam brought by the chargor based upon the same facts that did not avail him in opposing the application under s 256. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) set out the relevant law in the following terms:

> 'The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not

> commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue ….'

'Cause to the contrary' may be established, so as the Federal Court Imparted In *Low Lee Lian v Ban Hin Lee Bank Bhd*, only in the following three categories of cases:

(a) where a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the NLC;

(b) where the chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or,

(c) where the chargor is able to demonstrate that the order for sale would be contrary to some rule of law or equity.

But it is for a chargor to 'show cause' either in law or equity against an application for sale *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor*; *Overseas Union Bank Ltd v Lee Guat Cheow & Co Sdn Bhd* [1987] 1 MLJ 51). The chargor must adduce evidence by affidavit to discharge that onus (*Overseas Union Bank Ltd v Lee Guat Cheow & Co Sdn Bhd*)

On the facts and issues of the case, the plaintiff asserted, in the supporting affidavit (encl 4), that the defendant requested and the plaintiff agreed, in consideration; inter alia, of the security of two legal charges over the said land, to grant a fixed loan of RM125,000 and an overdraft of RM45,000 to the defendant, and that pursuant to that agreement, the defendant created, on 12 June 1993, two legal charges (Gadaian Perserahan No 24242/93 Jilid 2784 Folio 02 and Perserahan 17168/95 Jilid 3241 Folio 93) over the said land in favour of the plaintiff. The plaintiff further asserted, that sometime later the defendant requested and the plaintiff granted an overdraft of RM650,000 to the defendant, secured not by any charge but by the deposit of shares in public listed companies. So quite obviously, there were two distinct facilities: (i) a fixed loan of RM125,000 ('the fixed loan') and an overdraft of RM45,000 ('the first overdraft') secured by two land charges, and, (ii) an overdraft of RM650,000 ('the second overdraft') secured by the deposit 'of shares in listed companies. The plaintiff further asserted that the defendant defaulted on the agreed repayments, that the plaintiff demanded on 19 June 1998 (see encl 4 exh P4) from the defendant for his payment of the said arrears (RM2,944.80), that the defendant failed to comply with the plaintiff's said demand, that the plaintiff issued a notice in Form 16D dated 13 October 1998 (encl 4 exh P5) to the defendant, and that the defendant failed to remedy the default. According to the last accounts filed herein (encl 32), as at 29 September 2000, the defendant is indebted to the plaintiff in the sum of RM621,318.24, made out as follows:

(a)	fixed loan	RM	130,177.86
(b)	first overdraft	RM	62,515.21
(c)	second overdraft	RM	428.625.17
	Total	RM	621,318.24

Both learned counsel. Cik Ana Shahrana for the plaintiff and Mr Cherian Kuruvila for the defendant, informed the court, that this application for an order for sale is only with regard to the sums outstanding on the fixed loan and first overdraft (RM130.177.86 + RM62,515.21), in other words only with regard to the loans secured by the two legal charges. Both learned counsel also informed, that the only issue for judicial determination is whether the Form 16D was bad. Apparently, in the said notice in Form 16D, the plaintiff required the defendant to remedy not only the breach with respect to the charge but also with respect to the breach of the second overdraft secured by the deposit of shares.

Mr Cherian contended that the said Form 16D was bad and therefore of no effect. 'In the said Form 16D, the second overdraft secured by shares was demanded.' 'The only sum that could be demanded in the said Form 16D notice must be that due under the charge.' 'The second overdraft was not due under the charge.' 'The unpermitted demand rendered the said Form 16D null and void.' Mr Cherian further contended that the impression conveyed to the defendant by the said Form, 16D was, that to redeem the said land the defendant Had to settle all sums due, both secured and unsecured by the charges. 'That Form 16D was the foundation', and 'since it was bad, sale should not be ordered.

Cik Ana Shahrana had earlier contended that cl 10 of the annexure to the second charge permitted the plaintiff to grant further advances to the defendant and that such further advances shall be secured by the second charge. However, in 'view of the present understanding that this application for an order for sale is only with regard to the sums outstanding on the fixed loan and first overdraft (RM130,177.86 + RM62,515.21) and so that therefore the plaintiff is not relying on the second charge to recover the second overdraft, it must be so supposed that Cik Ana Shahrana had effectively abandoned her earlier argument altogether. Otherwise, she just said that the court in *Oriental Bank Bhd v Mohinder Pal Kaur a/p Tirlok Singh* [1996] 1 MLJ 788 (where the court, pursuant to the charger's application to set aside the order for sale, deducted that sum, unsecured by the charge but nonetheless demanded by the Form 16D, from the sum ordered to be recovered by sale of the land), did not set aside the order for sale.

It is only apt, since the one and only issue for judicial determination concerns the said notice in Form 16D, to refer to the pertinent statutory provisions. On the remedies of chargee it regard to the judicial sale of the land charged. Chapter three to Part 16 of the NLC begins with s 253 which reads :

(1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which the charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or Implied therein.

(2) The powers conferred by this Chapter shall be additional to those conferred by Chapter 4, and no chargee shall be debarred from exercising them by reason of the fact that he has already taken action under that Chapter.

The following provision, s 254 of the NLC, reads as follows:

(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-s (1) of s 253 of the NLC has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on 'the chargor a notice in Form 16D.

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) …

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied —

(a) the whole sum secured by the charge shall (if it; has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter;

Provided that para (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

It would be seen that the notice in Form 16D concerns only the case of a charge where there is a breach by the chargor of any of the agreements on his part expressed or implied therein. That notice in Form 16D must specify the particular breach of the charge. Section 254 of the NLC requires that Form 16D to be served before action for sale is taken. Only if the breach in question has not been remedied at the expiry of the period specified in the said Form 16D, may the chargee apply for sale in accordance with the provisions of Part 16 Chapter 3 of the NLC. Clearly, the provisions of Chapter 3 to Part 16 'are exercisable, as appropriate, only by chargees under registered charges … the remedy of [judicial] sale belongs exclusively to the registered chargee … the property cannot be sold under the Code where action is taken by the 'equitable' chargee … '(*National Land Code, A Commentary* by Judith Sihombing (2nd Ed) at p 552). ' … the Code recognizes only registered chargees. Hence, before the plaintiffs could invoke their right under s 256 of the Code they must first be registered chargees …' (*Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd*

[1990] 3 MLJ 493 at p 495 per Mohamed Dzaiddin J, as he then was). There could be no mistaking it. Only a registered chargee may serve a notice in Form 16D. And that notice in Form 16D must bear only upon the registered charge. That notice in Form 16D, available only to a chargor qua chargor to give notice to the chargor to remedy the specified breach of the charge in 'question, before action for sale is taken, cannot be taken out for any other purpose (see *Jacob v OverseasChinese Banking Corp, Ipoh* [1974] 2 MLJ 161). Only if the breach of the charge has not been remedied at the expiry of the period specified, is the chargee sanctioned to apply for an order for sale.

Yet, in spite of the aforesaid, the instant plaintiff required the defendant, to remedy both the breach with respect to the charge and with respect to the second overdraft secured by the deposit of shares. As for the reason. Miss Ana Shahrana said that the shares deposited had been sold but the sale proceeds received was not enough to settle the second overdraft. Mr Cherian contended that the impression conveyed to the defendant by the said Form 16D was, that to redeem the said land the defendant must settle both the secured and unsecured loans. Indeed, in the instant case, the plaintiff warned the defendant that proceedings would be taken to obtain an order for sale, unless both the sum of RM106,455.43 due on the fixed loan secured by a charge and the sum of RM399,420.67 due on the second overdraft secured by the deposit of shares were paid within seven days from the receipt of the said notice.

What is the legal effect of the inclusion of the loan unsecured by a charge in the said notice in Form 16D?

In *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 MLJ 115, where the plaintiff had lumped together all the amounts due under two separate charges, and the defendant contended that the plaintiff ought to have issued separate notices, the Federal Court per Mohamed Azmi FJ said:

> In our view, whether a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order of sale unjust, and this in turn must necessarily depend on the circumstances of each particular case.

Guided by that ratio in *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd*, Zakaria Yatim J (as he then was) held in *United Malayan Banking Corp Bhd v Bahruddin bin Mohammad @ Mamad* [1992] 4 CLJ 2060 (where the plaintiff admitted that the amount due as at 31 May 1988 was RM268,729.17 but that the' amount stated in the notice in Form 16D was RM283,385.09), that there was no evidence that the defendant had been prejudiced or misled by the amount stated in the notice, and that, therefore the notice in Form 16D was not bad in law.

Likewise guided by *Syarikat Kewangan Melayu Raya Bhd*, Suriyadi J held, in *Southern Bank Bhd v Chuah Beng Hock* [1999] 2 AMR 1826 (where the lender bank demanded both the secured and unsecured loan), that the debtor foist with the additional burden of the loan unsecured by a charge

could not have been not prejudiced by the defect in the said notice, and for that reason finding cause to the contrary, the learned Judge dismissed the application for an order for sale.

It would be otherwise if just an erroneous sum was demanded. In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283, where cl 5 of the charge annexure required a notice to be served before any default interest could be imposed and there was no evidence to show that such notice had been given, Lim Beng Choon J held that the wrongful demand for default interest rendered the notice in Form 16D ineffectual and invalid. But the learned judge clearly acknowledged (see p 287) that there is a distinction between an innocent erroneous sum specified in a demand and a wrongful demand for payment of something to which the chargee is not entitled whether under the charge or under a statutory provision. At p 288, the learned judge said:

> It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which plaintiff bank had no right.

Miss Ana Shahrana sought to overcome the odds by submitting the persuasive authority of *Oriental Bank Bhd v Mohinder Pal Kaur a/p Tirlok Singh*. Just that the circumstances of that case are quite differ altogether. In *Oriental Bank Bhd v Mohinder Pal Kaur a/p Tirlok Singh*, the applicant sought to set aside the order for sale made two years earlier, in 1993, in her absence. However, she failed to satisfactorily explain the inordinate delay in her setting aside application, and on the facts of the case, the court concluded that the setting aside application was not bona tide. This is not a setting aside application. This is not even a case in which the court could exercise its discretion to excuse a minor omission (see *Overseas Union Bank (M) Bhd v L & L Properties Sdn Bhd* [1999] 2 MLJ 637 at p 645) or allow the correction of a deficiency (see *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608, where Mahadev Shankar J noted that the plaintiff had not provided the statutory particulars even in the fourth affidavit). This is a case where the plaintiff had no right to use the notice in Form 16D to demand for the additional sum of RM399,420.67. Foist with the additional burden of the second overdraft that was much heavier than the burden of the fitted loan secured by the first charge, it could be hard to believe that the defendant would not have been prejudiced by the defect in the said notice.

Definitely, the defendant has demonstrated that the plaintiff has 'not complied with statutory requirements nor met the conditions precedent for the making of an application for an order for sale. After all, the defendant was not given any opportunity to remedy the breach only with respect to the charge. Rather, the plaintiff denied the defendant his statutory right, by a brazen disregard for the law. In the circumstances of this case, an order for sale would be unjust. Surely there is cause to the contrary. And so, for the above reasons, this application is dismissed with costs.

Application for order for sale dismissed with costs to the plaintiff.

Reported by Moy Saw Ha